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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

SOLEDAD CORONA,

Plaintiff and Appellant,

v.

BAC HOME LOANS SERVICING,
LP, et al.,

Defendants and Respondents.

B234507

(Los Angeles County
Super. Ct. No. BC434543)

APPEAL from a judgment of the Superior Court for Los Angeles County,
Robert L. Hess, Judge. Affirmed.

Michael P. Rubin & Associates, Michael P. Rubin and Sarah-Jane A.
Stecker for Plaintiff and Appellant.

Akerman Senterfitt, Justin D. Balser, Imran Hayat and Shiraz Simonian for
Defendants and Respondents.

Plaintiff Soledad Corona appeals from a judgment entered after the trial court sustained without leave to amend demurrers to her second amended complaint. Corona sued defendants BAC Home Loans Servicing, LP and Bank of America, N.A.¹ (collectively, BofA) for breach of contract and other related claims, based upon a purported mortgage modification agreement. The trial court found that Corona failed to state a claim because the allegations of the complaint and the documents attached thereto establish that no valid contract was formed. We affirm the judgment.

BACKGROUND

The allegations of Corona's second amended complaint are as follows.

In September 2008, Corona obtained a loan to purchase a residence in Los Angeles. The loan was secured by a deed of trust. BofA is the assignee of the loan, which originated with Countrywide Bank, FSB; Countrywide went out of business in or about July 2009.

Corona made all required payments on the loan until August 2009, when she suffered some health and financial problems. That month she retained an expert in loan modifications, Steve Kessedjian, to negotiate with BofA for a loan modification. On or about October 1, 2009, BofA caused to be recorded a notice of default.² On or about November 27, 2009, Kessedjian informed Corona that

¹ Corona alleges that BAC Home Loans Servicing LP (BAC) is a limited partnership and a wholly owned subsidiary of Bank of America, N.A. (BANA). BofA in its respondent's brief notes that BAC merged into BANA on July 1, 2011, and it includes in its respondent's appendix a copy of the certificate of merger, which was filed after judgment was entered in this case. Although ordinarily we do not consider matters that were not before the trial court at the time of its ruling, we will take judicial notice of the post-judgment certificate of merger under Evidence Code section 452.

² BofA asked the trial court to take judicial notice of the notice of default, which was recorded on July 14, 2009, rather than on October 1, 2009, as Corona alleged. BofA

BofA had approved her for a loan modification, that BofA would contact her directly, and that she should follow BofA's directions in concluding the loan modification.

BofA sent Corona a package of loan modification materials on or about November 30, 2009. The package, the contents of which are attached as an exhibit to the complaint, included a cover letter that stated: "To help us determine your eligibility for payment assistance, **the next step is for you to return the requested documents and enclosed forms.**" (Boldface in original.) The letter also directed Corona to complete, sign, and return all of the enclosed documents by December 5, 2009.

One of the documents included in the package was entitled "NEGOTIATION AGREEMENT." The introductory paragraph of that agreement stated: "We have received your request for workout assistance concerning your Loan with BAC Home Loans Servicing, LP. When signed by both of us, this letter will constitute a binding agreement ('Agreement') between you and BAC Home Loans Servicing, LP concerning BAC Home Loans Servicing, LP's workout discussions with you." Under paragraph 3, under the heading "Enforceability of Loan Documents" the agreement makes clear that BofA would continue to prosecute any foreclosure proceedings unless there was a written agreement to suspend or cancel the proceedings, or the loan is fully reinstated or paid off: "**BAC Home Loans Servicing, LP will continue with any and all collection and foreclosure action concerning your Loan, and such action will not be suspended or canceled under any circumstances unless and until BAC Home Loans Servicing, LP specifically agrees in writing to suspend or cancel such**

also asked the court to take judicial notice of the notice of trustee's sale that was recorded on October 29, 2009, and the trustee's deed upon sale that was recorded on December 21, 2009, which indicated that the property was sold on December 14, 2009.

action, or unless your Loan is fully reinstated or paid off. Therefore, each of us acknowledges and agrees that if your Loan is in foreclosure, a scheduled foreclosure sale will be conducted by BAC Home Loans Servicing, LP unless BAC Home Loans Servicing, LP specifically agrees in writing to suspend or cancel the foreclosure sale, or unless your Loan is fully reinstated or paid off in accordance with the Loan Documents and applicable law prior to the scheduled foreclosure sale.” (Boldface and underlining in original.)

Corona alleges that she was confused by receiving the package because she understood that “a loan modification had already been concluded.” Nevertheless, she signed the negotiation agreement and returned it to BofA on December 2, 2009.

On December 4, 2009, Corona received another letter from BofA, which also is attached as an exhibit to the complaint. The letter begins: “IMPORTANT MESSAGE ABOUT THE ABOVE REFERENCED LOAN [¶] **Our records show that this loan is in foreclosure.** Per your request, we have enclosed information concerning the reinstatement of this loan. [¶] WHAT YOU NEED TO DO [¶] READ ALL of this information CAREFULLY so you will know when and how to STOP the foreclosure process.” (Boldface in original.) The letter proceeds to inform Corona that the net total due to reinstate the loan is \$24,286.13, and that she must act quickly, before the foreclosure sale. Corona alleges that she was confused about the letter because she understood that the loan had been reinstated and that she did not have to make a balloon payment to comply with the loan modification.

On or about December 7, 2009, Corona received another letter from BofA, which is attached as an exhibit to the complaint. At the top of the letter, which is dated December 4, 2009, there is a heading stating “COMMITMENT TO MODIFY MORTGAGE.” Under the heading “WHAT THIS MEANS” the letter

states: “This letter constitutes a commitment to modify the Mortgage (identified above), subject to the terms and conditions stated below. This letter contains our offer, and it permits you to accept this offer. When signed by you, this letter will constitute your agreement to these terms and conditions. [¶] Our records indicate the Mortgage is currently in default. Although we are willing to modify the loan as described in this letter, please be advised that we will continue to pursue collection action. This action may include foreclosure. Upon completion of the modification process, which means all of the terms of this Commitment will have been met, your loan will be deemed current and we will cease collection activity on your loan. However, if you fail to sign this commitment or if you fail to perform as required in this commitment, we will complete our collection action, including foreclosure if necessary.” Immediately following these paragraphs -- but still on the first page -- is the following: “WHAT YOU NEED TO DO [¶] If you want to accept this commitment, you must sign this commitment and deliver it to BAC Home Loans Servicing, LP by December 9, 2009. Failure to do so will result in the automatic withdrawal by BAC Home Loans Servicing, LP of the offer to modify without further notice.”

The remainder of the letter sets out the terms of the modification, contingencies, amounts to be paid upon signing the modification, and the acceptance (with a place for Corona to sign and date the agreement). On each page of the four-page letter there is a reminder that, in order to accept the offer, the document must be signed and returned to BofA by December 9, 2009.³ Corona alleges that she did not understand there was a firm deadline of December 9, and

³ On page 3 of the letter, and only on that page, it states that the agreement must be properly notarized.

that she executed and returned the modification agreement on December 28, 2009, along with the requested payment.

On January 14, 2010, BofA sent Corona another letter, which she received several days later. The letter, attached as an exhibit to the complaint, states that BofA received her request for financial assistance, but BofA is unable to assist her at that time. The letter also informs her that if her financial situation changes, she should contact BofA with her updated information, but that in the meantime, she will be required to make her monthly payments in accordance with her promissory note.⁴

On January 21, 2010, BofA returned the check Corona had sent with the signed modification agreement on December 28, 2009. A letter accompanying the returned check stated that that BofA was returning the check because the amount is less than the total balance due, and that additional amounts may become past due until her account is brought fully current.

Corona alleges that, since January 21, 2010, BofA has taken the position that the loan modification agreement was not timely accepted by Corona, and therefore no contract was formed. She alleges that BofA is equitably estopped from asserting that no contract was formed because (1) BofA intentionally generated numerous and inconsistent written communications to her; (2) she reasonably believed she had a binding loan modification agreement based upon her loan modification expert's representations to her; (3) she was justifiably ignorant of the fact that there would not be a binding modification agreement unless she returned the signed agreement to BofA by December 9, 2009; (4) she reasonably relied upon and was confused by the inconsistent communications from BofA, and

⁴ As noted in footnote 2, *ante*, BofA asked the trial court to take judicial notice of the recorded trustee's deed upon sale, which shows that Corona's property had been sold by the trustee a month before this letter was sent.

therefore reasonably believed that she was in compliance when she returned the signed modification agreement on December 28, 2009; (5) BofA knew or should have known that as a layperson she would not have understood that she had to return the signed modification agreement by December 9, 2009 due to the numerous and inconsistent communications BofA sent to her; (6) by mailing the modification offer so that she did not receive it until December 7, 2009, BofA created a reasonable belief in her that it was not necessary to return the signed agreement and initial payment within two days; and (7) as a layperson, she reasonably believed and was led to believe by BofA's inconsistent communications that returning the payment before the first of the next month was sufficient performance under the agreement.

Corona alleges that she performed all conditions, covenants, and promises required of her under the modification agreement, and that BofA breached the agreement by conducting a trustee sale of the property and repudiating the agreement. In addition to her cause of action for breach of contract, Corona relies upon the same facts to allege causes of action for specific performance, injunctive relief, and declaratory relief.

BofA demurred to the entire complaint and each cause of action. It argued that (1) Corona's failure to tender the amount due on the mortgage bars her claims; (2) no valid contract was formed; (3) Corona's claims for specific performance, injunctive relief, and declaratory relief are remedies, not causes of action, and Corona is not entitled to those remedies because there was no valid contract that was breached; and (4) Bank of America, N.A. is not a proper defendant because Corona does not allege that it is the assignee of her particular loan.

The trial court sustained the demurrers without leave to amend. The court noted that the documents attached to the complaint make clear that Corona was required to sign and return the modification agreement by December 9, 2009 in

order to accept BofA's offer, and she alleges she did not do so until December 28, 2009. The court found that the documents and allegations establish that no contract was formed, and there were no facts alleged to establish estoppel. Judgment was entered dismissing the action with prejudice, from which Corona now appeals.

DISCUSSION

Corona contends on appeal that the complaint adequately alleges that a binding contract was formed and/or that BofA is estopped from denying that a contract was formed. We disagree.⁵

On review of a judgment of dismissal following the sustaining of a demurrer without leave to amend, we "accept[] as true the facts alleged in the complaint, together with facts that may be implied or inferred from those expressly alleged. [Citation.] We do not, however, accept the truth of contentions or conclusions of fact or law. [Citation.] Additionally, to the extent the factual allegations conflict with the content of the exhibits to the complaint, we rely on and accept as true the contents of the exhibits and treat as surplusage the pleader's allegations as to the legal effect of the exhibits." (*Barnett v. Fireman's Fund Ins. Co.* (2001) 90 Cal.App.4th 500, 505.) Finally, we consider matters that may be judicially noticed. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.)

We begin by examining whether the complaint properly alleges the existence of a binding contract. Corona argues that letters attached as exhibits to

⁵ Corona also raises other issues in her appeal, but we need not address them in light of our conclusion that the trial court correctly found that the allegations of the complaint, along with the documents attached thereto, establish that no contract was formed, and that Corona failed to allege facts sufficient to establish that BofA is estopped to assert that no contract was formed.

the complaint “taken as a whole, establish that an agreement was made by the loan modification expert, and the subsequent mailings were intended by [BofA] merely to firm up the agreement.” But Corona’s basic premise -- that an agreement was made by the loan modification expert -- is factually and legally faulty. First, to the extent she relies upon any alleged agreement that was made on her behalf by the expert, that oral agreement would be invalid under the statute of frauds. (See *Secrest v. Security National Mortgage Loan Trust 2002-2* (2008) 167 Cal.App.4th 544, 553 [a forbearance agreement that substituted a new monthly payment and altered the lender’s ability to exercise a right to foreclose under the note and deed of trust is subject to the statute of frauds].) Moreover, her complaint does not allege that the alleged agreement made by the expert was fully formed. Instead, it alleges that the expert told her that BofA approved her for a loan modification, and that she needed to follow BofA’s instructions in *concluding* the loan modification. In other words, she alleges that further steps were necessary to complete the alleged agreement.

The letters themselves make clear that the “agreement” referenced by the loan modification expert was, at best, an agreement to negotiate the terms of a loan modification agreement. The first package BofA sent to Corona after her expert told her of BofA’s agreement included a “negotiation agreement” along with a cover letter that stated that the purpose of the enclosed documents was “[t]o help us determine your eligibility for payment assistance.” The subsequent December 4, 2009 letter clearly stated that it was BofA’s offer to modify the mortgage, and that, to accept the offer, Corona was required to sign and return the document by December 9, 2009, or the offer would automatically be withdrawn. Given Corona’s allegation that she did not return the signed document until December 28, 2009, the trial court correctly concluded that BofA’s offer was withdrawn before

Corona purported to accept it and therefore, as a matter of law, no contract was formed.

Corona argues, however, that sustaining BofA's demurrers was improper because she pleaded that BofA was equitably estopped to assert that she failed to timely sign and return the document. She contends that, by sending her contradictory and inconsistent letters, BofA led her to believe that there was no firm deadline by which she had to sign and return the offer, and therefore her acceptance on December 28, 2009 was sufficient to create a binding contract. She is incorrect.

Evidence Code section 623 sets out the doctrine of equitable estoppel: "Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it." "The essence of an estoppel . . . is that the party to be estopped has by false language or conduct led another to do that which he would not otherwise have done and as a result thereof that he has suffered injury.'" (*Hair v. State of California* (1991) 2 Cal.App.4th 321, 328-329.)

In this case, the December 4, 2009 letter clearly states that it must be signed and returned to BofA by December 9, 2009, or the offer will automatically be withdrawn. Corona does not point to -- and we cannot find -- anything in any of the documents BofA sent to Corona before this letter that would suggest that this deadline could be interpreted as anything but a firm deadline. Even if those documents were, as Corona asserts, "contradictory and inconsistent" (and we do not find that the pre-December 4 documents were contradictory or inconsistent⁶), that in itself is insufficient to allege that BofA's prior statements or conduct

⁶ We agree that BofA's subsequent letters are confusing, given that they seem to ignore that the trustee's sale had already taken place by that time.

reasonably misled Corona to believe that BofA did not mean what it said when it wrote that the offer would be automatically withdrawn if Corona did not sign and return it by December 9, 2009. Therefore, the trial court correctly found that Corona did not allege facts sufficient to establish equitable estoppel.

DISPOSITION

The judgment is affirmed. Respondent shall recover its costs on appeal.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.